89-785

NO. 89-_____

Supreme Court, U.S.
FILED
NOV 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM 1989

ALAMO BANK OF TEXAS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Did Congress, in either the Bank Merger Statute or the Bank Secrecy Act, intend to impose flow-through criminal liability on a surviving state bank for pre-merger crimes committed by a national bank that disappeared in the merger?

PARTIES

Alamo Bank of Texas is a wholly owned subsidiary of Alamo Corporation of Texas.

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No. 89-_____

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM 1989

ALAMO BANK OF TEXAS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for a Writ of Certiorari

To the United States Court of Appeals

for the Fifth Circuit

Petitioner, Alamo Bank of Texas, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered September 14, 1989.

OPINIONS BELOW

The opinion of the Fifth Circuit is published at 88 F.2d and Reprinted as Appendix B. The denial of a petition for rehearing and suggestion for rehearing en banc is reprinted as Appendix A. The opinion of the District Court is published as *United States v. Central National Bank*, 705 F. Supp. 336 (S.D. Tex. 1988) and is reprinted as Appendix C.

JURISDICTION

The denial of the timely petition for rehearing and suggestion for rehearing en banc was entered on September 14, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

12 U.S.C. §214b: Continuation of business and corporate entity

The franchise of a national banking association as a national banking association shall automatically terminate when its conversion into or its merger or consolidation with a State bank under a State charter is consummated and the resulting State bank shall be considered the same business and corporate entity as the national banking association, although as to rights, powers, and duties the resulting bank is a State bank. Any reference to such national banking association in any contract, will, or document shall be considered a reference to the State bank if not inconsistent with the provisions of the contract, will, or document or applicable law.

31 U.S.C. §5313: Reports on domestic coins and currency transactions

(a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any

other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

31 U.S.C. §5322: Criminal penalties

(a) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315) shall be fined not more than $250,000, or imprisonment not more than five years, or both.

(b) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315), while violating another law of the United States or as part of a pattern of illegal activity involving more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 10 years, or both.

STATEMENT OF THE CASE

Alamo Bank of Texas and Central National Bank consummated their merger on April 1, 1987 with Central then surrendering its Federal Charter to the Comptroller of the Currency and notifying him that it would operate in the future as a branch of Alamo Bank of Texas.[1] On December 17, 1987 Central and Alamo were indicted for seven failures to file currency transaction reports in violation of the Bank Secrecy Act. Each transaction cited involved only Central and had occurred between three and four years prior to the merger. The indict-

[1] When Central was founded Texas still retained its historical prohibition against branch banking. Thus while Alamo and Central were owned by the same holding company, Alamo Corporation of Texas, they were, in law and fact, separate corporations. By constitutional amendment the prohibition on branch banking was lifted November 4, 1986, and pursuant to Vernon's Ann. Civ. St. Art. 342-903, Central and Alamo were merged.

ment named Alamo solely because it was the "successor in interest" to Central.[2]

Subsequently the Government and Alamo agreed on a conditional plea of nolo contendere on three counts. When the District Court accepted the agreement, it was reduced to writing and expressly preserved Alamo's right to appeal the issue of flow-through liability (its responsibility for Central's transactions). The District Court relied on *United States v. Polizzi,* 500 F.2d 856, 907 (9th Clr. 1974), *cert. denied,* 419 U.S. 1120 (1975) for the proposition that the continued existence of a corporation was to be determined by reference to state law. Finding no relevant Texas or Fifth Circuit cases, the District Court turned to decisions from the Seventh and Tenth Circuits interpreting language similar to the Texas Business Corporation Act and concluded that Texas law would authorize prosecution of the successor corporation. Alamo was then fined $750,000, of which $500,000 was suspended in lieu of three years probation.[3] Thereafter the Government moved to dismiss the entire indictment against Central as well as the remaining counts against Alamo. The District Court granted the motions and Alamo appealed on the issue of flow-through liability.

Although the Fifth Circuit rejected the District Court's reasoning, it affirmed Alamo's conviction. Eschewing the complications of Texas banking and business law, the court relied instead on the federal Bank Merger Statute, 12 U.S.C. §214(b), and this Court's Sherman Act decision in *Melrose Distillers, Inc. v. United States,* 389 U.S. 271 (1959), to conclude that "Alamo is CNB and it is CNB now named Alamo" which is properly accountable for Central's violations. Despite

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[2] Neither the Government nor either court below attributed any significance to the common ownership of Alamo and Central: "It is the position of the United States that the issue of flow through liability does not turn on who owned the pre-merger banks or the resulting bank." Fifth Circuit Brief of the United States at page 3 n. 1.

[3] The condition of probation is Alamo's compliance with "All local, state and federal rules and regulations and laws that pertain to banking and reporting."

its conclusion that the District Court erred in looking to state law, the Fifth Circuit's terse opinion did not note that *Melrose Distillers* had looked to state law for the continued existence of the wrongdoer. Nor did the court discuss, as *Melrose Distillers* did, 359 U.S. at 274, any federal policy reasons for applying flow-through liability under the circumstances.

REASONS FOR GRANTING THE WRIT

The decision below, if generally followed, will have substantial adverse effects on the federal agencies with regulatory control over banking, the industry, and the public treasury. If the adverse effects were a necessary aspect of federal law, it would be regrettable. Yet the two courts below split on why flow-through liability was required, cited different federal statutes for its imposition, and did not spend even a second demonstrating that their conclusion conformed to Congressional intent. It was as if the courts felt compelled to reach a result that would harm both the industry and established canons of statutory construction.

1. The Decision Below Needlessly Complicates the Task of Restoring the Banking Industry in the US

The banking industry, in the Southwest particularly, has in recent years been a major and gloomy news story; well over 700 banks have failed in the past five years. This year alone, a major topic in Congress was not whether, but how, to engage in a massive multi-billion dollar bail-out of the thrift industry.[4] The Office of Thrift Supervision announced in early November, 1989 that about 800 thrifts will not meet the tough capital standards set under the new law; many of these will therefore fail.[5]

Accompanying the story of economic collapse is an equally depressing story: massive, certain, and possibly undetected criminal activity. Congressional hearings suggest that in about one out of three bank failures and three out of four thrift fail-

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[4] Financial Institutions Reform, Recovery and Enforcement Act of 1989, Public Law 101-73.

[5] *Wall Street Journal,* November 7, 1989 at A15.

ures criminal activity within the failing institution was at least an important factor contributing to the institution's failure.[6]

Although Central's merger with Alamo was a result of changes in the Texas law on branch banking and had nothing to do with the problem besetting the industry in the Southwest, the decision below impacts directly on the intersection of failed institutions and preexisting criminal activity. First, when an institution fails or is on the verge of failing, the Federal Government, through the Federal Deposit Insurance Corporation becomes involved. Second, the institutions the Federal Agencies are acquiring may have engaged in criminal activities for which the statutes of limitations may not have run. Congressional hearings have already established that criminal activity is part and parcel of too many bank failures. At the end of October, 1989, Congressman Henry Gonzalez, Chair of the House Banking Committee, announced he would hold hearings in San Antonio in early December dealing with the between $400,000,000 and $800,000,000 of drug money laundered through banks in the Southwest.[7] Congressman Gonzalez' hearings will undoubtedly establish an unfortunate prevalence of money laundering in Southwestern banks, yet that crime is often difficult to discover even with reasonable diligence.

As banks fall into Federal hands, the FDIC and other agencies must make decisions on whether (a) to liquidate the failed institution, 12 U.S.C. §1823(c)(1), (b) create a temporary "bridge" bank until the institution can be acquired, 12 U.S.C. §1821(i), or (c) arrange for the acquisition of the failed institution by another insured institution in what is known as a "purchase and assumption" (P&A) transaction, 12 U.S.C. §1823(c)(2)(3). P&A is the universally preferred solution because the acquiring bank will pay a premium for the goodwill of the failed bank while accepting tangible assets that are less than the amount of liabilities assumed. The FDIC saves the direct costs of a payout (which, based on the 450 P&As au-

[6] H. Rep. No. 100-1088, 100th Cong., 2nd Sess. 10 (1988).

[7] *San Antonio Express-News,* October 26, 1989 at 2-A.

thorized between 1983 and 1987, saved the Permanent Insurance Fund $458 million), [8] and depositors have a continuing entity. Yet not every institution is eligible for a P&A because the FDIC must conclude that the sale of the failed institution will be less expensive to the agency than liquidation. 12 U.S.C. §1823(c)(4)(A). Therefore, by definition, if a P&A is possible, it is beneficial. [9]

The decision below may have slapped a huge fine on Alamo for Central's transgressions, but its impact will be felt in Washington as well as South Texas. The courts below held that criminal liability does not turn on (1) ownership and (2) knowledge of potential liability. All acquiring banks are subject to the decision because there is nothing they can do to protect themselves from unknowable criminal activity.

In the marketplace faced by the FDIC where the agency wishes to dispose of insolvent or failing banks, the decision cannot help but have a deterrent effect on acquisition. If an acquiring bank should take over another bank that had undiscovered criminal liability, then the acquiring bank will pay for it (through fines and probation). Even if one assumes that the statistics about criminal activities of failed banks are inflated, there is still a substantial amount of likely criminal activity. Thus any acquiring bank knows that it is possible, maybe even likely, that the acquired bank has engaged in criminal activity and that if the crimes are discovered, the acquiring bank will pay for them.

The decision below will be irrelevant for a bank that is so insolvent that it must be liquidated: criminal fines will be of no moment and any criminal actions taken will have to be against the employees who committed the acts, rather than against the institution for a failure of supervision. From the FDIC's perspective it will not matter because liquidation means the bank cannot be saved anyway.

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[8] *Annual Report(s) of the Federal Deposit Insurance Corporation (1983)-(1987).*

[9] *G. Bentson, et al., PERSPECTIVES ON SAFE & SOUND BANKING 95-96 (MIT Press 1986).*

However, when it is possible to keep a bank afloat through a bridge bank on the way to a P&A or a P&A immediately, then the decision below is of real importance. Any acquiring bank must assume that there is a reasonable chance that the to-be-acquired bank will have unknown (to them, maybe known to the Department of Justice) criminal liabilities which if prosecuted could result in a substantial liability. In the Fifth Circuit the US Attorney quite properly noted that an acquiring bank must act in its own best interests.[10] In the marketplace for FDIC-held banks, this will mean that *every* bid will reflect a market discount for unknown criminal liabilities. The reason it will affect every bid flows from the sweep of the Government victory below: all acquiring banks are responsible for the transgressions of the acquired bank whether the transgressions are known or not.

The market discount will lower the price to the FDIC on every bid. Whether or not the to-be-acquired bank has in fact committed criminal acts, the bid for it will necessarily carry some discount to cover the possibility of flow-through liability. Because the possibility of flow-through liability will depress the amount willing bidders will offer for each bank, some percent of banks that otherwise would be acquired by P&A will not meet the statutory cost test and thus the FDIC will have to liquidate them at a direct cost to its own funds.

There is no reason to believe that the economics of the new rules will be financially beneficial to the government (and therefore to the taxpayers). To be beneficial, they would have to bring in more money through fines than will be lost in lower bids. If the rules are simply revenue neutral, fines will equal the reduced revenues from lower bids (although the fines will go into a different kitty than the successful bids). But by far the most likely scenario is that because every bid will be lower than it otherwise would be and that many criminal acts will escape prosecution for one reason or another (not discovered, statute of limitations, speculative and not worth pursuing), the total income from bids and fines will be less—proba-

[10] Fifth Circuit Brief of the United States at 16.

bly significantly less—than would the income from bids if there were no possibility of flow-through liability.

To be sure, rules of criminal liability need not make economic sense. The purposes of the criminal law are multifaceted, yet none of the purposes of the criminal law—rehabilitation, incapacitation, deterrence, and retribution—apply to an innocent purchaser. In the Fifth Circuit, the Government argued that flow-through liability serves deterrence.[11] That statement is far more ironic than accurate. For flow-through liability to serve as a deterrent bank officials would have to go through the following chain of thought: we should not commit criminal actions because if we do and then become insolvent, our successor corporation (if any) will be forced to pay for our wrongs. A much more forthright statement about deterrence is that flow-through liability will prevent any bids from being made for some banks—thereby leaving the FDIC with no option except liquidation when, but for flow-through liability, a P&A would have been possible—and will reduce the highest bid made for other banks—thereby costing the government money in such cases as well.

Alamo is not arguing that criminal activity should be immunized by a subsequent merger. Those individuals responsible for violations of the criminal laws can and should be punished. Those banks that violate the laws can and should be punished. If the statutes provide for flow-through liability, then so be it. But flow-through liability for the banking industry is not without adverse consequences and those ought not be imposed out of pure frustration that too much wrongdoing has been going on and *someone* should be held responsible.

2. The Decision Below Ignored All Appropriate Canons for the Construction of Federal Criminal Statutes

This Court has stressed repeatedly that when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spo-

[11] *Id.* at 26.

ken in language that is clear and definite. *Dowling v. United States,* 473 U.S. 207, 214 (1985) (citations omitted). There is no doubt that Congress has the power of choice. Central National Bank was incorporated under Federal Law; the currency transaction reports at issue were required by Federal Law; Central merged with Alamo as authorized by Federal Law. Yet nowhere does Federal Law expressly provide, as does New York law, that the successor corporation should be criminally liable for the acts of the merged corporation. *United States v. Polizzi,* 300 F. 2d 856, 908-09 (9th Cir. 1974), cert denied, 419 U.S. 1120 (1975) (relying on N.Y. Bus. Corp. Law §906(b)(3): surviving corporations "shall assume and be liable for all of the liabilities, obligations and *penalties"* of acquired corporation) (emphasis added).

Dowling mandates some evidence that Congress chose to authorize the criminal sanctions imposed. No one doubts that Congress authorized punishment of the individual bank officers responsible for Central's failure to file the currency transaction reports; they were not innocent witnesses to a third party's crime. Nor is there dispute that despite the merger, Central could have been indicted (as indeed it was). The policy reasons, noted by the Court in *Melrose Distillers,* preclude a merged corporation, no less than guilty individuals, from simply walking away from its crime. But Alamo took no part in the criminal activity; it was not even operating in Pharr, Texas where the crimes were committed. Thus what is disputed is whether Congress authorized the choice made by the Government to indict Alamo on the basis of flow-through liability. Some law, somewhere, must authorize it. Only the Bank Secrecy Act (which Alamo stands convicted of violating) and the Bank Merger Act are possibilities.

Despite the fact that the indictment charged Alamo with a "willful" violation of the Bank Secrecy Act, the Government has taken the position that it does not matter that Alamo had no knowledge of Central's transgressions because Alamo is a "successor in interest."[12] Yet "successor in interest" does

[12] *Id.* at 17-18.

not appear in the Bank Secrecy Act nor does it appear in the regulations that 31 U.S.C. §5313 authorizes the Secretary of the Treasury to promulgate. It is a construct of the prosecution and contrary to the entire thrust of the Bank Secrecy Act.

Under the Bank Secrecy Act accidental mistakes are treated with leniency, negligent errors somewhat more severely, willful violations with considerable severity, and a pattern of violations with added harshness. The statutory provisions reflect a calibrated scheme whereby the severity of the offense is matched with the severity of the sanction. A non-willful, non-negligent violation may only be dealt with through injunctive relief. 31 U.S.C. §5320. Negligence authorizes the Secretary of the Treasury to impose a modest civil monetary penalty. 31 U.S.C. §5321(a)(6). Willful violations (as charged in the indictment) can be punished by fines of up to $250,000 as well as five years in jail. 31 U.S.C. §5322(a). Finally, a willful violation, coupled with a violation of any other law of the United States can result in a fine of $500,000 and ten years imprisonment. 31 U.S.C. §5322(b).

The legislative history of the Bank Secrecy Act fully supports the conclusion that it was no accident that Congress matched the severity of sanction against the degree of culpability of the defendant. The House Report states: "Mere isolated lapses ought not ordinarily be the occasion for the imposition of heavy penalties," but repeated illegal conduct cannot be "shrugged off as a mere cost of doing business. . . .[T]he potential fine must be large enough to have some real economic impact."[13]

The Fifth Circuit looked elsewhere and cited none of this. While Congress clearly had in mind more severity for the willful violator, the Fifth Circuit treated the merged corporation as if it had that necessary willfulness even though there was no dispute that the acquired corporation was the institution engaged in the criminal violations. Yet no one has ever suggested that during the period in question (when Central and

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[13] H. Rep. No. 91-975, 91st Cong. 2nd. Sess. (1970) reprinted in 1970 U.S. Cong. Code & Admin. News 4394, 4405-06.

Alamo were separate entities) that Alamo violated any laws. And the District Court acknowledged that "there is no evidence of anything [criminal] that has happened since you [Alamo] took over. And this matter is very simple. You are paying for a crime that you may not have committed."[14] Without even the need for general rules of construction of criminal statutes, such as lenity, it is plain that the terms of the Bank Secrecy Act explicitly demand the individualized guilt that Alamo lacks.

The Fifth Circuit avoided discussing the statute that Alamo was held to have violated by discussing instead a civil statute, the Bank Merger Act. It was here, the court held, that Congress evidenced its intent that flow-through liability exist.[15]

In §214(b) the Bank Merger Act provides that the franchise of a national bank shall terminate automatically when the national bank is merged into a state bank. "[T]he resulting State bank shall be considered the same business and corporate entity as the national banking association *although* as to rights, powers and duties the resulting bank is a State bank. Any reference to such national banking association in any contract, will or document shall be considered a reference to the State bank if not inconsistent with the provisions of the contract, will, or document or applicable law." (Emphasis added). The Fifth Circuit relied on the language prior to the italicized "although" for its conclusion that §214(b) makes Alamo "responsible" for Central's actions, "includ[ing] criminal responsibility."

What is strange, and strained, about the construction is that it looks to the first half of the sentence dealing with form and

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[14] Record, Volume II at 21.

[15] Because the decision to impose flow-through liability rests on a civil statute rather than a specific criminal statute, it cannot be limited to currency transaction reports alone. Logically it must apply to Truth in Lending Act violations, 15 U.S.C. §1611, Electronic Funds Transfer Act violations, 15 U.S.C. §1693n, bribery, 18 U.S.C. §201, and extortionate credit transactions, 18 U.S.C. §892 unless (as none of the statutes do) the statute itself evidences a contrary intent.

ignores the second half which deals with substance. The first half says the national bank goes into the state bank; the second half says what consequences flow therefrom. Neither the language before nor after the "although" includes any words connoting flow-through liability. "Criminal responsibility" which the Fifth Circuit mentions, is not found in the statute. Nor are any similar words such as "actions," "proceedings," "claims," and, more specifically, as with the New York statute in *Polizzi*, "penalties." It is an understatement to note that there were easier linguistic choices Congress could have used if it had wished to support the Fifth Circuit's interpretation of §214(b).

If Congress intended to create criminal liability by a civil statute one would expect that *somewhere* there would be some statement indicating this intent. If not in the statute, then at least in the legislative history. From the Fifth Circuit's opinion it would be impossible to know, for as with the Bank Secrecy Act, the court offered not a word of legislative history. The legislative history is sparse, but two things stand out. First, there is not so much as a single word indicating Congress was thinking of criminal liability. The "undisputed purpose" of the Bank Merger Act was equality of treatment between state and national banks, particularly as to the tax consequences of merger. *Ellis v. State National Bank of Alabama,* 434 F.2d 1182 (5th Cir. 1970), *cert. denied,* 402 U.S. 973 (1971). Prior to adoption of §214(b) a dissolution and asset transfer was necessary to convert a national into a state bank, which occasionally resulted in adverse tax consequences that a state bank did not incur when it merged into a national bank.[16] The "main feature" of the statute was its tax treatment; it also granted more "leeway" to merge. 96 Cong. Rec. 11958 (1950). That is a far cry from a conscious decision to impose flow-through criminal liability. Of course, many statutes have more than a single purpose. But to fabricate an additional purpose lacking either textual support in the statute or even a single mention in the legislative history is to usurp

[16] S. Rep. No. 1104, 81st Cong. 2nd Sess., *reprinted in* 1950 U.S. Code Cong. & Admin. News 3012, 3013.

the legislative function. Creation of criminal liability requires a conscious decision of the legislature. *United States v. Bass*, 404 U.S. 336, 348 (1971).

If the decision below were required by the language of some statute, there could be no complaint. Thus in *Melrose Distillers* two wholly owned subsidiaries were indicted under the Sherman Act. Shortly after indictment they were dissolved and became separate divisions of a new corporation with unchanged ownership. They then moved to dismiss the indictment, arguing that their dissolution rendered prosecution impossible. A unanimous court found to the contrary. Section 8 of the Sherman Act defined "person" to include corporations "existing" under the laws of any state. A look to the relevant state laws revealed that the corporations continued to exist for purposes of prosecution. (Maryland: dissolution shall not "abate any pending suit or proceeding by or against"; Delaware: "Proceeding" against a dissolved corporation shall continue where "proceeding" is elsewhere used in Delaware as including "criminal prosecutions." *Id.* at 273.) Federal indictments normally abate on dissolution unless saved by statute, *id.* at 272, but because of the state law, these were saved. Furthermore, "policy reasons" supported the same conclusion since before and after dissolution the two divisions had the same ownership and there was no reason to "allow[ ] them to escape criminal penalties." *Id.* at 274.

Here, however, no statutory language contains a word about flow-through liability. The legislative history offers not a word of encouragement to the prosecution. Furthermore, unlike the Sherman Act, under the Bank Secrecy Act the Secretary of the Treasury can promulgate regulations to implement the act. Yet none of the regulations speaks of flow-through liability. Indeed the thrust of the Bank Secrecy Act is directly to the contrary. But even if the Act were simply ambiguous, the ambiguity should be resolved in favor of lenity to the accused. *Liparota v. United States*, 471 U.S. 419, 427 (1985). Not only does lenity serve the due process interest of fair warning to an accused—a warning wholly lacking in the instant case—but it also "strikes the appropriate balance be-

tween the legislature, the prosecutor, and the court in defining criminal liability." *Id.* at 427.

Here the balance is askew, given that neither court below pointed to (or could have pointed to) language of penalties or discussed legislative history indicating that Congress had devoted any consideration to the choice the courts were making. This should be enough to warrant review and reversal. But, in addition, there are substantial policy interests warranting review because of the current state of the banking industry and the need for Federal agencies to arrange for acquisitions of failed banks that may have criminal liabilities. Flow-through liability is inappropriate in this context, and this Court can perform a vital national service by heading off further such determinations that could prove both costly and disruptive to the efficient resolution of the existing banking mess.

CONCLUSION

Because the views of the Federal Deposit Insurance Corporation would be of assistance, Petitioner, Alamo Bank of Texas, respectfully suggests that the Court request the Solicitor General to file them. Thereafter, for the reasons presented in this Petition, Petitioner respectfully submits that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-6112

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ALAMO BANK OF TEXAS,
Defendant-Appellant.

U.S. COURT OF APPEALS
FILED
SEP 14, 1989
GILBERT F. GANUCHEAU
CLERK

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion AUGUST 7, 5 Cir. 1989, F.2d)
(September 14, 1989)

Before CLARK, Chief Judge, JOHNSON and SMITH, Circuit Judges.

PER CURIAM:

☒ The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

☐ The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

☐ A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41
FOR STAY OF THE MANDATE.

ENTERED FOR THE COURT:

/s/
CHIEF JUDGE

REHG-6

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee.

v.

ALAMO BANK OF TEXAS,
Defendant-Appellant.

No. 88-6112.

United States Court of Appeals,
Fifth Circuit.

Aug. 7, 1989.

State bank that was survivor of merger with national bank was convicted in the United States District Court for the Southern District of Texas, Filemon B. Vela, J., of violations of the Bank Secrecy Act, based on activities of the national bank before the merger. Appeal was taken. The Court of Appeals, Clark, Chief Judge, held that the national bank could not escape punishment for its failure to file currency transaction reports by merging with a state bank and taking the state bank's corporate identity.

Judgment affirmed.

See also 705 F. Supp. 336.

Banks and Banking 283

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National bank that had been indicted for failing to file currency transaction reports could not escape criminal liability by merging with and assuming corporate identity of state bank; under federal bank merger statute, national bank continued to exist as part of state bank and could be held criminally responsible for its premerger activities. Vernon's Ann. Texas Civ. St. art. 342-308; National Bank Act, 12 U.S.C.A. § 214b;

U.S. v. ALAMO BANK OF TEXAS

31 U.S.C.A. § 5322; Vernon's Ann.Texas Const. Art. 1, § 19; U.S.C.A. Const.Amends. 5, 14.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, JOHNSON and SMITH, Circuit Judges.

CLARK, Chief Judge:

Alamo Bank of Texas appeals its conviction for several violations of the Bank Secrecy Act, 31 U.S.C. § 5322. The offenses were committed by officers of Central National Bank, prior to its merger with Alamo. Alamo argues that it should not be held responsible for Central National Bank's pre-merger actions. We affirm the conviction.

In early 1987, Alamo Bank of Texas and Central National Bank (CNB) merged under the title and charter of Alamo. CNB, a nationally chartered bank, surrendered its charter to the Comptroller of the Currency and became a branch bank of Alamo, a state bank of Texas. Three to four years prior to the merger, CNB committed numerous violations of the Bank Secrecy Act by failing to report substantial cash transactions. Following the merger, Alamo was indicted for the reporting violations. Alamo conditionally pleaded nolo contendere to the charges, preserving its right to appeal the question of whether it, as the successor to the merger, could be held criminally responsible for CNB's pre-merger conduct. Alamo was fined $750,000, $500,000 of which was suspended in lieu of 36 months probation.

Alamo argues that the Bank Secrecy Act does not apply to successor banks, that Alamo did not act with the requisite intent to establish criminal liability under the Act, and that holding it responsible for the criminal acts of a separate entity violates the Due Process Clauses of the United States and

Texas Constitutions. These contentions by Alamo, however, beg the real issue in this appeal. That is, has CNB ceased to exist or does it continue to be present under the title and charter of Alamo? The United States contends that it did not prosecute Alamo for the actions of another; rather, the United States is seeking to hold CNB responsible for its crimes, and CNB still exists under the name Alamo. If this is correct, Alamo's contentions are moot.

Both the United States and the State of Texas have bank merger statutes. The relevant language of the statutes is similar, but not identical.

(a) The federal statute is 12 U.S.C. § 214b:

> The franchise of a national banking association as a national banking association shall automatically terminate when its conversion into or its merger or consolidation with a State bank under a State charter is consummated and *the resulting State bank shall be considered the same business and corporate entity as the national banking association,* although as to rights, powers, and duties the resulting bank is a State bank. Any reference to such national banking association in any contract, will or document shall be considered a reference to the State bank if not inconsistent with the provisions of the contract, will, or document or applicable law. (emphasis supplied)

(b) The Texas statute is Tex.Rev.Civ.Stat.Ann. Art. 342-308:

> The *resulting bank shall be deemed a continuation in entity and identity of each of the banks involved in the merger; shall be subject to all the liabilities, obligations, duties and relations of each merging bank* and shall without the necessity of any conveyance, assignment or transfer become the owner of all of the assets of every kind and character formerly belonging to the merging banks. (emphasis supplied)

Neither statute has been interpreted in this precise context. The district court relied on the Texas statute because the resulting bank was a Texas institution, citing *United States v. Polizzi,* 500 F.2d 856, 906-07 (9th Cir.1974). We disagree.

The federal banking statute, section 214b, which controls the rights and liabilities of federally chartered banks, expressly provides for the merger of a national bank with a state bank under the state bank's charter. If the law of the state of charter of the resulting bank could determine the law applicable to the federally chartered bank, the federal statute would be rendered inoperative. *Polizzi* is distinguishable. That case did not involve the choice between applying a federal or state bank merger statute. Its holding merely adopted New York law governing corporate merger to fix the existence of a New York corporation as a person for the purposes of a federal racketeering statute.

Under the federal bank statute, CNB continues to exist, albeit now as part of Alamo. "[T]he resulting state bank shall be considered the same business and corporate entity as the national banking association. . . ." 12 U.S.C. § 214b. Thus, Alamo is CNB, and it is CNB now named Alamo which is responsible for CNB's actions and liabilities. This includes criminal responsibility. *See Melrose Distillers, Inc. v. United States,* 359 U.S. 271, 274, 79 S.Ct. 763, 765, 3 L.Ed.2d 800 (1959).

In *Melrose,* the Supreme Court interpreted a state dissolution statute which called for continued corporate liability and held that there was no basis to distinguish civil from criminal liability.

> After dissolution [the dissolved corporation] simply became divisions of a new corporation under the same ultimate ownership. In this situation, there is no more reason to allowing them to escape criminal penalties than damages in

civil suits. As the Court of Appeals noted, a corporation cannot be sent to jail. The discharge of its liability whether criminal or civil can be effected only by the payment of money.

Id.

CNB cannot escape punishment by merging with Alamo and taking Alamo's corporate persona. Neither the pre nor post merger Alamo as a separate legal entity is being forced to pay for the wrongs of CNB. The operation of the federal statute makes it unnecessary to reach Alamo's other arguments.

The judgment of conviction is

AFFIRMED.

APPENDIX C

UNITED STATES of America

v.

CENTRAL NATIONAL BANK and Alamo Bank of Texas, as Successor in Interest to Central National Bank.

Crim. No. B-87-537.

United States District Court,
S.D. Texas,
Brownsville Division.

May 31, 1988.

Predecessor bank and successor bank were indicted for failing to file proper currency transaction reports as required by law. Defendants moved to dismiss indictment. The District Court, Vela, J., held that: (1) flow-through liability could be maintained in order to hold successor bank liable for predecessor bank's currency transaction report violations which occurred three years prior to merger between predecessor bank and successor bank, and (2) predecessor bank was not "dead" for purposes of criminal prosecution after merger.

Motion denied.

1. Banks and Banking 67
United States 34

Flow-through liability could be maintained to hold successor bank liable for predecessor bank's alleged criminal currency transaction report violations which allegedly occurred prior to merger between predecessor bank and successor bank; Texas statutes not only made surviving corporation liable for all liabilities and obligations of predecessor but expressly included any claim, action or proceeding by or against predecessor corporation could be prosecuted with new corporation

substituted in its place. V.A.T.S. Bus Corp.Act, art. 5.06; 31 U.S.C.A. §§ 5313, 5322(b).

2. Banks and Banking 67
United States 34

In criminal prosecution for currency transaction report violations which had allegedly been committed by predecessor bank three years prior to its merger with successor bank, predecessor bank would not be dismissed as defendant based on contention that predecessor bank was "dead" because it had surrendered its charter in connection with merger, as Texas statutes permitted survival of corporation for at least three years following its dissolution, and predecessor bank did not cease to exist but continued in business entity and identity through successor bank. V.A.T.S. Bus.Corp.Act. art. 7.12.

Thomas G. Sharpe, Jr., Brownsville, Tex., for defendants.

Charles Lewis, Asst. U.S. Atty., for U.S.

MEMORANDUM AND ORDER

VELA, District Judge.

Before this Court is Defendants' Motion To Dismiss the Indictment and Supplemental Motion to Dismiss in the above numbered cause.

Statement Of The Case

The United States of America has named two financial institutions in this indictment. Central National Bank (hereinafter "CNB"), and Alamo Bank of Texas (hereinafter "AB"), as successor in interest to Central National Bank, have been indicted for failing to file with the Internal Revenue Service the proper Currency Transaction Reports (CTR's or Form 4789) as required by Title 31 United States Code Sections 5313, and 5322(b), and for conspiracy to fail to file the above in violation of Title 18 United States Code Section 371.

CNB was authorized to commence the business of banking as a National Banking Association on February 14, 1983. The seven specific deposits that CNB is alleged to have failed to file and conspired to fail to file allegedly occurred between February 14, 1983 and April 2, 1984. CNB is accused of conspiring with Juan Frank Garcia, Emilio Quintero-Payan and Juan Jose Quintero-Payan (not here indicted).

AB is a financial institution authorized to operate under the Texas banking laws. On February 11, 1987 the Board of Directors of both banks approved a plan of merger providing for the merger of CNB with and into AB under the charter and title of Alamo Bank of Texas. On April 1, 1987, CNB became a branch bank of AB and CNB surrendered its Charter to the Office of the Comptroller of the Currency on April 3, 1987.

Issues

In considering Defendants' Motions to Dismiss the indictment the Court considered four different issues.

1. Whether flow-through liability can be maintained in order to hold AB (as successor) liable for CNB's alleged criminal violations which supposedly occurred 3 years prior to the merger.

2. Whether CNB is considered "dead" relieving it from the alleged prior criminal conduct.

3. Whether the letter by Deputy Comptroller (Comptroller of the Currency) relieved CNB for the alleged criminal conduct.

4. Whether the indictment is faulty because the indictment does not confine the alleged transactions to a twelve month period.

Analysis

[1] 1) From the outset, the Court acknowledges that both Federal and State law allow a merger and provide for the

continuation of business and corporate entity. (The wording of these statutes is similar but not identical). The Court is persuaded that the Texas Statute controls because, a) AB, the resulting bank, is a state bank and is authorized to operate under the Texas banking laws, and b) it was the Texas Department of Banking that issued the Certificate of Merger and a Branch Certificate of Authority to CNB.

The Texas State Statute entitled Merger-Trust Powers states in pertinent part:

> Any two or more state banks, or if national banks are hereafter authorized by the laws of the United States to participate in such a merger, *any one or more state banks and any one or more national banks domiciled in this State may . . . be merged.*
>
> (2) If the Banking Commissioner approves the merger . . . *the resulting bank shall be deemed a continuation in entity and identity of each of the banks involved in the merger; shall be subject to all liabilities, obligations, duties and relations of each merging bank;* . . . (Court's emphasis)

Tex.Rev.Civ.Stat.Ann. art. 342-308 (Vernon Supp.1988).

It appears that the Texas Legislature intended this banking merger statute to parallel the merging of Texas corporations at least in the procedure that a stockholder may dissent from the merger. "That procedure applies to a merger under this article as if the state bank were a corporation organized under the Texas Business Corporation Act." Tex.Rev.Civ.Stat.Ann. art. 342-308 (Vernon Supp.1988).

Under the Constitution, the federal government is not expressly granted the power to form corporations. *United States v. Polizzi,* 500 F.2d 856, 907 (9th Cir.1974), *cert. denied,* 419 U.S. 1120, 95 S.Ct. 802, 42 L.Ed.2d 820 (1975). "Therefore, the existence and status of corporations . . . should be determined by reference to the law of the state of their incorporation, unless the application of that law would conflict with the federal policy." *Polizzi,* at 907. The Court therefore looks to Texas state law on the effect of the merger.

The Texas Statute entitled Effect of Merger or Consolidation of Domestic Corporations provides in part:

> When such merger or consolidation of domestic corporations has been effected: . . . (5) Such surviving or new corporation shall thenceforth be responsible and liable for all liabilities and obligations of each of the corporations so merged or consolidated; and any claim existing or action or proceeding pending by or against any of such corporations may be prosecuted as if such merger or consolidation had not taken place, or such surviving or new corporation may be substituted in its place. Neither the rights of creditors nor any liens upon the property of any such corporations shall be impaired by such merger or consolidation.

Tex.Bus.Corp. Act Ann. art. 5.06 (Vernon Supp.1988).

This statute seems to expand on the concept set out in the statute authorizing a merger of national and state banks. The statute not only makes the new or surviving corporation liable for all liabilities and obligations but expressly includes that any claim, action, or proceeding by or against any of the corporations may be prosecuted with the new corporation substituted in its place.

The Court has found no Fifth Circuit cases directly on point with regard to whether the aforementioned terms are broad enough to include criminal liability.[1] The Seventh and Tenth Circuits, in well reasoned opinions, contemplated whether the

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[1] The Fifth Circuit Court of Appeals agreed with other circuits which stated that the word "proceedings" is broad enough to cover criminal prosecutions. *Alamo Fence Company of Houston v. United States*, 240 F.2d 179, 182-183 (5th Cir.1957). However, the statute before the Court in *Alamo*, Vernon's Ann.Civ.St. art. 1374, granted the State of Texas alone the right to prosecute criminally a dissolved Texas corporation. Art. 1374 has been repealed but it was the source of the present Tex.Rev.Civ.Stat.Ann. art. 1302-5.09 (Vernon 1980).

statutes in two different states allowed criminal prosecution under statutes similarly worded to those of Texas. "The words 'any action, suit, or proceeding' in their ordinary and generally accepted meaning and use embrace, so we think, all forms of litigation, civil, criminal, bankruptcy and admirality." *United States v. P.F. Collier and Son Corp.*, 208 F.2d 936, 940 (7th Cir.1953). "The word 'actions', like the term 'proceedings' in the Delaware and Maryland statutes . . . is sufficiently broad to embrace a criminal prosecution of a corporate defendant." *United States v. Mobile Materials, Inc.*, 776 F.2d 1476 (10th Cir. 1985).[2]

[2] 2) The Defendants claim that CNB should be dismissed from the case arguing that CNB is "dead" because the Government allowed the surrender of its charter. The Court disagrees with the concept that CNB is dead, because as stated earlier Tex.Rev.Civ.Stat.Ann. art 342-308 (Vernon Supp.1988) provides "the resulting bank shall be deemed a continuation in entity and identity of each of the banks involved in the merger."[3] CNB did not cease to exist but continued in business entity and identity.

The Court further acknowledges that two Texas statutes would allow survival of the corporation for at least three years after dissolution. "A corporation dissolved . . . shall continue its corporate existence for a period of three years from the date of dissolution, for the following reasons: (1) prosecuting or defending in its corporate name any action or proceeding

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[2] The *Mobile Materials* court relied heavily on *Melrose Distillers, Inc. v. United States*, 359 U.S. 271, 79 S.Ct. 763, 3 L.Ed.2d 800 (1959). In *Melrose* the Supreme Court of the United States held that two separate corporations that were dissolved under their respective state statutes were not allowed to abate criminal proceedings. The Court in their decision said that they were satisfied that the term "proceeding" implied enough vitality to make the corporation an "existing" enterprise for the purposes of the Sherman Act. *Melrose Distillers, Inc. v. United States*, 359 U.S. 271, 273, 79 S.Ct. 763, 765, 3 L.Ed.2d 800 (1959).

[3] The Federal Statutes that compare to this Texas Statute are 12 U.S.C. § 214a which allows the merger, and 12 U.S.C. § 214b which provides in part "the resulting state bank shall be considered the same business and corporate entity as the national banking association . . .".

by or against the corporation . . ." Tex. Bus. Corp. Ann. art. 7.12 (Vernon Supp. 1988).

The other Texas statute provides: "Any action or cause of action for any fine, forfeiture or penalty that the state of Texas has, or may have, against any corporation chartered under the laws of this or any other state, territory or nation, shall not abate or become abated by reason of the dissolution of such corporation, whether voluntary or otherwise, or by the forfeiture of its charter or permit." Tex.Rev.Civ.Stat.Ann. art. 1302-5.09 (Vernon 1980).

The Fifth Circuit Court of Appeals has held "that a state can no more continue the existence of one of its corporations and at the same time immunize it against federal criminal prosecution, than it could have created the corporation in the first instance with such immunity." *Alamo Fence Company of Houston v. United States*, 240 F.2d 179, 183 (5th Cir.1957). "If dissolution by reason of the statute works no extinguishment of a legal right, we discern no reason why it works on extinguishment of a legal liability, whether civil or criminal. . . . [There] is no sound reason why a legislature would intend to relieve a dissolved corporation of its criminal liability and at the same time preserve its civil liability." *P.F. Collier* at 940.

3) Defendants' argument that the Comptroller of the Currency forgave CNB for its past wrongdoing is a question to be determined by the facts. The question whether the Comptroller of the Currency in fact has authority to litigate or settle criminal matters will be carried along and determined if indeed CNB was forgiven for the violations alleged in the indictment.

4) Defendants' last issue questions whether the pattern of illegal conduct that the Government has alleged is longer than the 12 month period required in the Federal CTR Statute. In the recent case *United States v. Bank of New England*, 821 F.2d 844, 852 (1st Cir.1987), *cert. denied*, U.S. , 108

S.Ct. 328, 98 L.Ed.2d 356 (1987), the Court said, "The Government must prove that the transaction involved more than $100,000 in a 12-month period. No one transaction has to be greater than $100,000, so long as the total of the transaction is in *any* 12-month period. It's a shifting period, so you can look at any period that you want." This issue is also to be determined from the facts in the case.

Rulings And Effect

Defendants' Motion to Dismiss and Supplemental Motion to Dismiss are hereby DENIED. [The denial of these Motions does not expose Defendants to double penalty or liability.]